

A **Re Khoo Chee Tong, ex p Unik (M) Sdn Bhd**

HIGH COURT (JOHOR BAHRU) — BANKRUPTCY NO 29-120-1993
HAIDAR J
2 MARCH 1996

B **Bankruptcy** — *Notice* — *Application to set aside* — *Failure of debtor to apply to set aside judgment* — *Effect* — *Validity of judgment debt* — *Whether court can go behind judgment* — *Circumstances when court will inquire into validity of judgment debt*

C **Bankruptcy** — *Notice* — *Application to set aside* — *Proper procedure* — *Whether application to set aside can proceed by way of notice of motion* — *Bankruptcy Rules 1969 rr 18 & 95(1)*

D The petitioners in this case issued a bankruptcy notice against the debtor, one Khoo Chee Tong ('the debtor'), for the sum granted by a default judgment obtained on 27 February 1992 in the sessions court at Johor Bahru. As the debtor did not comply with the bankruptcy notice, the petitioners filed a creditor's petition on 5 October 1993. The debtor then filed a notice of motion praying for the setting aside of the bankruptcy notice and all other subsequent proceedings on the grounds as set out in his affidavit in support. The notice of motion was heard by the deputy registrar on 22 December 1994 and was dismissed with costs. Accordingly, the registrar made an adjudicating order and a receiving order against the debtor. The debtor appealed against the orders of the registrar. The issue before the court was whether an application to set aside the bankruptcy notice could proceed by way of a notice of motion.

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Held, dismissing the appeal:

- G (1) The procedure for setting aside a bankruptcy notice has been provided for by filing an affidavit under r 95(1) of the Bankruptcy Rules 1969. The notice of motion was in essence to set aside the bankruptcy notice, therefore the procedure adopted by the debtor in filing a notice of motion was wrong (see p 42I-43B); *Re Yong Chooi Fong, ex p Perwira Habib Bank Malaysia Bhd* [1992] 2 CLJ 1262 followed.
- H (2) Up until the date of the hearing of the notice of motion, the debtor had not filed an application to set aside the default judgment obtained against him. This showed the lack of bona fides on the part of the debtor who claimed that although the judgment was regular, it was tainted with illegality. Further, the doctrine of laches would operate against him (see p 43G); *Malaysia Building Society Bhd v Lim Kheng Kim & Ors* [1988] 3 MLJ 175 and *Public Finance Bhd v Lee Bee Rubber Factory Sdn Bhd & Ors* [1994] 1 MLJ 495 followed.
- I (3) The court hearing an application to set aside the bankruptcy notice cannot go behind the judgment. The validity of the

judgment debt will only be inquired into when there is evidence of fraud or collusion or miscarriage of justice (see p 43I); *Sovereign General Insurance Sdn Bhd v Koh Tian Bee* [1988] 1 MLJ 304, *Re Beauchamp* [1904] 1 KB 572, *Re Howell* (1915) 84 LJKB 1399 and *Re Flatau* (1889) 22 QBD 83 followed.

[Bahasa Malaysia summary]

Pempetisyen di dalam kes ini telah mengeluarkan suatu notis kebangkrapan terhadap penghutang, seorang bernama Khoo Chee Tong ('penghutang'), untuk jumlah yang dibenarkan melalui suatu penghakiman ingkar yang diperolehi pada 27 Februari 1992 di dalam mahkamah sesyen di Johor Bahru. Oleh kerana penghutang telah tidak mematuhi notis kebangkrapan itu, pempetisyen telah memfailkan suatu petisyen pemiutang pada 5 Oktober 1993. Penghutang kemudiannya telah memfailkan suatu notis usul yang memohon untuk mengetepikan notis kebangkrapan itu dan semua prosiding selanjutnya atas alasan yang dibentangkan di dalam affidavit sokongannya. Notis usul itu telah didengar oleh timbalan pendaftar pada 22 December 1994 dan telah ditolak dengan kos. Berikutan daripada itu, pendaftar telah membuat suatu perintah penghukuman dan suatu perintah penerimaan terhadap penghutang. Penghutang telah merayu terhadap perintah-perintah pendaftar tersebut. Isu di hadapan mahkamah adalah sama ada suatu permohonan untuk mengetepikan notis kebangkrapan itu boleh dijalankan melalui notis usul.

Diputuskan, menolak rayuan itu:

- (1) Prosedur untuk mengetepikan suatu notis kebangkrapan telah diperuntukkan dengan memfailkan suatu affidavit di bawah k 95(1) Kaedah-Kaedah Kebankrapan 1969. Notis usul itu adalah pada zahirnya untuk mengetepikan notis kebangkrapan itu, oleh itu prosedur yang dipakai oleh penghutang dengan memfailkan notis usul adalah salah (lihat ms 42I-43B); *Re Yong Chooi Fong, ex p Perwira Habib Bank Malaysia Bhd* [1992] 2 CLJ 1262 diikuti.
- (2) Sehingga tarikh pembicaraan notis usul itu, penghutang masih belum memfailkan suatu permohonan untuk mengetepikan penghakiman ingkar yang diperolehi terhadapnya. Ini menunjukkan kekurangan bona fides pada pihak penghutang yang telah menyatakan bahawa walaupun penghakiman itu adalah mengikut aturan, ianya telah dicemari dengan kepenyalahan undang-undang. Selanjutnya, doktrin 'laches' akan beroperasi menentanginya (lihat ms 43G); *Malaysia Building Society Bhd v Lim Kheng Kim & Ors* [1988] 3 MLJ 175 dan *Public Finance Bhd v Lee Bee Rubber Factory Sdn Bhd & Ors* [1994] 1 MLJ 495 diikuti.
- (3) Mahkamah yang mendengar suatu permohonan untuk mengetepikan notis kebangkrapan itu tidak boleh menyiasat sebalik penghakiman tersebut. Kesahan hutang penghakiman hanya akan

A dipersoalkan apabila terdapat bukti wujudnya fraud atau pakat-sulit atau salah laksana keadilan (lihat ms 43I); *Sovereign General Insurance Sdn Bhd v Koh Tian Bee* [1988] 1 MLJ 304, *Re Beauchamp* [1904] 1 KB 572, *Re Howell* (1915) 84 LJKB 1399 dan *Re Flatau* (1889) 22 QBD 83 diikuti.]

B [Editorial Note: Rule 18 of the Bankruptcy Rules 1969 has been amended by PU(A) 60/93 to read as follows:

(1) Except where these rules or the Act otherwise provide, every application to the court shall, unless the Chief Justice otherwise directs, be made by summons in chambers supported by affidavit.

C (2) Notwithstanding subrule (1), where applicable, all applications filed by way of motion before the commencement of these rules may be heard by the registrar as if they were applications made under such rules.]

Notes

D For cases on setting aside a bankruptcy notice, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1365–1377.

Cases referred to

E *Beauchamp, Re* [1904] 1 KB 572
Flatau, Re (1889) 22 QBD 83
Howell, Re (1915) 84 LJKB 1399
Malaysia Building Society Bhd v Lim Kheng Kim & Ors [1988] 3 MLJ 175

F *Public Finance Bhd v Lee Bee Rubber Factory Sdn Bhd & Ors* [1994] 1 MLJ 495

Sovereign General Insurance Sdn Bhd v Koh Tian Bee [1988] 1 MLJ 304
Yong Chooi Fong, ex p Perwira Habib Bank Malaysia Bhd, Re [1992] 2 CLJ 1262

G Legislation referred to

Bankruptcy Act 1967 s 3(1)(i)
Bankruptcy Rules 1969 rr 18, 95(1)

H *Vijaya Gopal (Vijaya Gopal & Assoc)* for the appellant.
Jayakumar Sundralingam (Reginald Vallipuram & Co) for the respondent.
M Jegathesan for the Official Assignee.

Cur Adv Vult

I **Haidar J:** In these bankruptcy proceedings, a bankruptcy notice dated 1 March 1993 was issued against Khoo Chee Tong by Unik (M) Sdn Bhd for a default judgment obtained on 27 February 1992 against him for a sum of RM28,000 and costs of RM909 and interest of RM2,589.84 calculated up to 1 March 1993 in the sessions court at Johor Bahru vide

Summons No 52-5-1992-2 (see encl 3). Learned counsel for Khoo Chee Tong conceded that the judgment was a regular judgment. A

As Khoo Chee Tong failed to comply with the notice of bankruptcy, Unik (M) Sdn Bhd filed a creditor's petition on 5 October 1993 (encl 21). Subsequently Khoo Chee Tong filed a notice of motion on 21 December 1993, praying for the setting aside of the bankruptcy notice and all other subsequent proceedings on the grounds set out in his affidavit in support thereof (encl 27). B

On 22 December 1994, encls 21 and 27 were heard by the learned deputy registrar. He dismissed the notice of motion with costs and accordingly made a receiving order and an adjudication order against Khoo Chee Tong ('the debtor'). The debtor appealed against the said orders of the learned deputy registrar (encl 40). C

The issue here is whether the debtor in applying to set aside the bankruptcy notice could proceed by way of notice of motion.

Section 3(1)(i) of the Bankruptcy Act 1967 provides that unless within seven days after the service of the bankruptcy notice (other than where there is an order of stay of execution) the debtor either complies with the requirements of the bankruptcy notice or satisfies the court that he has a counterclaim, set-off or cross-demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained, the debtor commits an act of bankruptcy. D E

Rule 95(1) of the Bankruptcy Rules 1969 sets out the procedure for the debtor to set aside a bankruptcy notice and I quote:

95(1) The filing of an affidavit shall operate as an application to set aside the bankruptcy notice, and thereupon the registrar shall fix a day for hearing the application, and shall give not less than three clear days' notice thereof to the debtor, the creditor and their respective solicitors, if known. F

Rule 95(2) provides that no act of bankruptcy shall be deemed to have been committed under the notice until the application has been heard and determined. G

Though by way of para 5 of his affidavit (encl 26) the debtor denied receipt or knowledge of the bankruptcy notice issued against him, his counsel subsequently withdrew the denial. In the event, the debtor was caught by the seven-day rule. The debtor then purportedly invoked r 18 by filing the notice of motion. Rule 18 reads: H

18 Except where these rules or the Act otherwise provide, every application to the court shall, unless the court otherwise directs, be made by motion supported by affidavit. I

Learned counsel for the judgment creditor contended that the procedure adopted by the debtor in this case was wrong as the notice of motion was in essence to set aside the bankruptcy notice. He cited *Re Yong Chooi Fong*,

- A *ex p Perwira Habib Bank Malaysia Bhd* [1992] 2 CLJ 1262 in support thereof where the learned judge, at p 1264, said:

Clearly to me in this present case the intention of the judgment debtor in the filing of the notice of motion, as he says in prayers (a), (b) and (c) is clearly in substance for the sole purpose of setting aside of the bankruptcy notice, the procedure for which has been provided for by the filing of an affidavit under r 95 of the said Rules.

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In r 95 it says in no uncertain terms [that] the filing of an affidavit by the judgment debtor in due time 'shall operate as an application' to set aside the bankruptcy notice and the judgment debtor has by statute been given seven days of the service on him of such notice to do so else he commits an act of bankruptcy.

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On this ground alone the notice of motion should be dismissed.

Even assuming that the debtor by way of the notice of motion is relying on grounds other than set-off, etc, the learned author in *The Law and Practice in Bankruptcy* by Williams and Muir Hunter (19th Ed) at p 38,

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says:

- (b) On grounds other than set-off, etc.

The debtor may apply by motion (that is not by the summary affidavit procedure of BR 139) to set aside the notice on other grounds, eg irregularity, bad service, payment (or quare legal tender) of the debt, etc; the time limit of seven days does not apply to such applications. But the court cannot on such an application go behind the judgment and inquire into the validity of the debt, as it can in the case of a petition ...

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In para 6 of his affidavit in encl 26 the debtor deposed that he did not enter an appearance and file a defence in time due to the fact that he was not aware of the advertisement of the summons. Clearly such deposition could not be accepted as the summons was in fact personally served on him on 21 January 1992 (see para 9 of encl 3) and the affidavit of service exhibited therein — exh 'LWK 4'. Further, the debtor was served with a copy of the judgment in default obtained against him on 19 March 1992 (see exh 'LWK 5'). Up to the date of the hearing of the notice of motion, the debtor had not filed an application to set aside the default judgment entered against him. It has been more than two years now! It shows the lack of bona fides on the part of the debtor to claim now that though the judgment was regular, it was tainted with illegality. I would go one step further and say that the doctrine of laches would operate against him (see *Malaysia Building Society Bhd v Lim Kheng Kim & Ors* [1988] 3 MLJ 175 and *Public Finance Bhd v Lee Bee Rubber Factory Sdn Bhd & Ors* [1994] 1 MLJ 495).

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In any event there are ample authorities to show that the court hearing an application to set aside the bankruptcy notice cannot go behind the judgment (see *Sovereign General Insurance Sdn Bhd v Koh Tian Bee* [1988] 1 MLJ 304; *Re Beauchamp* [1904] 1 KB 572 and *Re Howell* (1915) 84 LJKB 1399). However, the validity of the judgment debt will only be inquired into when there is evidence of fraud or collusion or miscarriage of justice (see *Re Flatau* (1889) 22 QBD 83). Regrettably there is none of

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such evidence before me except that the learned counsel for the debtor, whilst admitting that the judgment was regular, alleged that it was tainted with illegality. This she tried to do by trying to persuade the court to admit the two affidavits (encls 37 and 39), which were rejected by the learned deputy registrar, by urging the court to invoke its discretion under r 44. No reasons were advanced by the debtor for the court to exercise its discretion and accordingly I would decline to do so as otherwise parties would be allowed or encouraged to flout the rules.

In the circumstances I am of the view that the learned deputy registrar rightly dismissed the notice of motion with costs and the receiving order and the adjudicating order are affirmed by me.

The appeal is dismissed with costs.

Appeal dismissed.

Reported by CK Ong

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